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8
9 **BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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12 HEARING IN THE MATTER OF
13 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
14 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF DIVERSION
15 FOR CALIFORNIA WATERFIX

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**PROTESTANT RESTORE THE DELTA'S
MOTION FOR ORDER OVERRULING
OBJECTIONS BY THE DEPARTMENT OF
WATER RESOURCES TO A SUBPOENA
DUCES TECUM AND COMPELLING
PRODUCTION OF SUBPOENAED
DOCUMENTS**

1 **INTRODUCTION**

2 Protestant Restore the Delta (“Restore the Delta”) hereby responds to the Department of
3 Water Resources' ("DWR") motion to quash and for protective order, filed in response to Restore the
4 Delta's subpoena duces tecum dated February 14, 2018. Contrary to DWR’s argument that the
5 subpoena duces tecum requests documents now beyond the scope of the California WaterFix Part 2
6 hearing, and otherwise requests documents on an infeasible timeframe, Restore the Delta seeks
7 information that is not only reasonable, necessary, and will lead to the discovery of admissible
8 evidence, but the need now for the documents is entirely because of DWR’s own actions leading up
9 to Part 2 of the WaterFix hearing. Furthermore, DWR’s assertion that it attempted several meet and
10 confer calls to resolve the subpoena duces tecum with Restore the Delta on March 1 and 2, 2018, but
11 never received a response, is contrary to the requirement in Code of Civil Procedure, section
12 2016.040 to show “a reasonable and good faith attempt at an informal resolution.” Not only did
13 DWR fail to even attempt to meet and confer until *the day before* the deadline for response, it also
14 failed to contact the additional counsel listed on Restore the Delta’s subpoena duces tecum and with
15 whom DWR has been in recent contact, or even email counsel to follow up, as has been the normal
16 form of correspondence for all communications in this proceeding, including those between DWR
17 and Restore the Delta.

18 Accordingly, pursuant to Government Code section 11450.30, subdivision (b) and California
19 Code of Regulations, title 23, section 649.6, subdivision (b), Restore the Delta respectfully moves
20 for an order overruling DWR’s objections and compelling DWR to produce documents responsive to
21 Restore the Delta’s subpoena duces tecum. Alternatively, if the Hearing Officers are considering
22 granting DWR’s motion to quash or request for a protective order, Restore the Delta requests that the
23 subpoenaed documents be ordered due within a reasonable timeframe before commencement of Part
24 3 of the WaterFix hearing.

25 **ARGUMENT**

26 The State Water Resources Control Board (“SWRCB”) and its Hearing Officers have the
27 authority to resolve an objection to a subpoena duces tecum, such as motions for a protective order
28 and motions to quash. (Gov. Code, § 11450.30.) In response to such motions, the SWRCB “may

1 make an order quashing the subpoena entirely, modifying it, or directing compliance with it.” (State
2 Wat. Resources Control Bd., subpoena form 7/00 (citing Gov. Code, § 11450.30, subd. (b); Cal.
3 Code Regs., tit. 23, § 649.6, subd. (b)).) In considering whether to limit the scope of discovery,
4 however, the SWRCB may do so if the "burden, expense, or intrusiveness of that discovery *clearly*
5 *outweighs* the likelihood of discovering admissible evidence.” (Code Civ. Proc., § 2017.020(a)
6 (emphasis added).) As the California Supreme Court has consistently held, "discovery statutes are to
7 be construed broadly in favor of disclosure, so as to uphold the right to discovery whenever
8 possible." (*Puerto v. Superior Court*, 158 Cal.App.4th 1242, 1249 (2008).)

9 Here, Restore the Delta requests documents and communications regarding DWR’s
10 consideration and evaluation of the cost, operations, and environmental effects of a 6000 cfs single
11 tunnel alternative, or phased-in construction of the two tunnels. Such records either themselves
12 constitute relevant evidence to be considered during Part 2 of the WaterFix hearing and/or can lead
13 to the discovery of relevant evidence. Moreover, the timeliness of Restore the Delta’s documents
14 request, which DWR now claims is unreasonable, is solely the fault of DWR, who chose not to
15 announce publicly a significant change in the WaterFix project until *one day* before the Part 2
16 hearing started, leaving Restore the Delta no choice but to issue the subpoena soon thereafter. All in
17 all, DWR has failed to establish good cause for limiting the scope of discovery.

18 **A. The Requested Records Are Reasonable, Necessary, and Relevant to the Efficient**
19 **Disposition of the WaterFix Hearing**

20 Discovery in the SWRCB’s proceedings should, as in civil actions in the superior courts, be
21 construed broadly in favor of permitting discovery. As courts have repeatedly explained, "[t]he
22 scope of discovery [in civil actions] is very broad." (*Tien v. Superior Court*, 139 Cal.App.4th 528,
23 535 (2006).) This expansive scope of discovery "enable[s] a party to obtain evidence in the control
24 of his adversary in order to further the efficient, economical disposition of cases according to right
25 and justice on the merits.” (*Fairfield v. Superior Court for Los Angeles County*, 246 Cal.App.2d 113,
26 119-120 (1966).) Consistent with this purpose, the California Supreme Court has consistently held
27 that "discovery statutes are to be construed broadly in favor of disclosure, so as to uphold the right to
28 discovery whenever possible." (*Puerto v. Superior Court*, 158 Cal.App.4th 1242, 1249 (2008).)

1 Code of Civil Procedure section 2017.010 further provides that "any party may obtain
2 discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the
3 pending action." In the SWRCB's administrative hearings, relevant evidence "is the sort of evidence
4 on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code,
5 § 11513(c).)

6 **1. The requested records are relevant to Part 2 of the hearing.**

7 Consistent with courts' broad interpretations of discovery, Restore the Delta's subpoenaed
8 records are necessary and reasonably calculated to lead to the discovery of admissible evidence.
9 DWR's estimated "reasonable timeframe for production" of 120 days is either exaggerated or
10 strongly suggests the existence of a large volume of responsive records and communications with
11 relevant agencies. (DWR's Motion to Quash and Protective Order at p. 7 ("DWR Motion").) Such
12 records very well could lead to discoverable evidence. For example, such records likely include
13 analyses comparing the version of the project as originally described in DWR's petition of August
14 25, 2015 with significant changes that could include a larger single tunnel or multi-year, phased-in
15 construction approach. Such comparative analysis would be highly relevant to the Part 2 hearing,
16 especially to the extent the records discuss comparative impacts, water flow, or even cold storage
17 needs and requirements between the currently defined project and a significantly changed project.
18 At a minimum, to the extent these records uncover facts pertaining to the currently defined WaterFix
19 project, whether it be costs, operations, or impact analysis, Restore the Delta has a right to review
20 them for purposes of cross-examination and rebuttal testimony during the Part 2 hearing.

21 Of equal import, these documents are also relevant to the public interest argument Restore
22 the Delta is making as part of the Part 2 hearing. Restore the Delta's testimony makes a public
23 interest argument that the WaterFix project should be dismissed presently because the true costs of
24 the project, and who will be responsible for its financing, have not been accurately represented to
25 Californians. Ms. Barrigan-Parrilla's testimony for Part 2 specifically identified and offered evidence
26 of the distinct possibility that Petitioners were working with water contractors on an evaluation of a
27 single tunnel project prior to the November 30, 2017 deadline for Part 2 testimony. Ms. Barrigan-
28

1 Parrilla's testimony thus responds directly to a history of project cost evaluations being hidden and
2 arguably misrepresented to public water agencies and municipalities throughout California, during
3 dozens, if not hundreds of public water district meetings. Restore the Delta submits this lack of
4 transparency fails to serve the interests of urban water ratepayers, including those who are part of
5 California's environmental justice community, and all Californians, who are the final backers of
6 revenue bonds sold by public agencies in California. To the extent the records requested reference
7 costs of the WaterFix project and actual or potential financing, or lack there of, they are relevant to
8 the Part 2 hearing. Indeed, DWR submitted a cost analysis as recently as February 13, 2018 setting
9 forth costs for a single tunnel. Earlier documents referencing such costs are clearly relevant to the
10 Part 2 hearing and Restore the Delta's specific arguments regarding the public interest. Because
11 these documents could affirm Restore the Delta's submitted testimony, they are particularly relevant
12 and go to the weight of the testimony presented.

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15 **2. The requested records have been properly subpoenaed at this time.**

16 Even if the SWRCB concludes these records are unnecessary or irrelevant to Part 2 of the
17 WaterFix hearing, that does not mean the subpoena itself should be quashed or is untimely.
18 Production of the requested records now is still relevant to the WaterFix hearing itself as well as
19 appropriate given that the SWRCB's February 21, 2018 ruling provides strong evidence that a Part 3
20 hearing will be necessary. (SWRCB's Ruling on Outstanding Motions (Feb. 21, 2018).) Restore the
21 Delta has a right to subpoena and procure these records now in order to allow sufficient time to
22 review and analyze them before Part 3 of the WaterFix hearing commences. Producing these
23 documents now will also promote hearing efficiency and lessen the likelihood of extension requests
24 later.

25 **3. The requested records are necessary for proper cross-examination.**

26 Lastly, the subpoenaed records are necessary for effective cross-examination of DWR's
27 witnesses. A key purpose of cross-examination is to challenge the validity of both the underlying
28 documents and testimony as presented. Due process requires that Restore the Delta have the ability

1 to highlight inconsistent statements or demonstrations of bias or other evidence that will assist the
2 Hearing Officers in weighing the evidence and making fact-based determinations.

3 **B. Document Production is Not Unduly Burdensome**

4 Objections based on burden "must be sustained by evidence showing the quantum of work
5 required." (*West Pico Furniture Co. v. Superior Court*, 56 Ca1.2d 407, 417 (1961).) Courts have
6 noted the "legislative acknowledgment that some burden is inherent in all demands for discovery.
7 The objection of burden is valid only when that burden is demonstrated to result in injustice." (*Id.* at
8 p. 418.) In fact, the scope of discovery may be limited if the "burden, expense, or intrusiveness of
9 that discovery *clearly outweighs* the likelihood of discovering admissible evidence." (Code Civ.
10 Proc., § 2017.020(a) (emphasis added).)

11 Here, DWR cannot explain why producing subpoenaed records that it has previously
12 prepared and already acknowledged that it can produce (pursuant to its response to Restore the
13 Delta's Public Records Act request) results in an unreasonable burden on DWR that rises to the level
14 of an "injustice." Furthermore, in its response to Restore the Delta's similar Public Records Act
15 request, DWR provided an estimated timeframe for production of 90 days, yet now claims "a
16 reasonable timeframe for production is 120 days." (DWR Motion at p. 7.) Restore the Delta could
17 not have requested these materials before now because Restore the Delta, along with the rest of the
18 protestants and public, only just became aware of their existence due to DWR's announcement, the
19 day before commencement of the Part 2 hearing, of a possible significant change in project. Contrary
20 to DWR's assertions, it is not unduly burdensome or a waste of hearing time to produce these
21 records now as they will allow parties to review, analyze, and verify the significance and accuracy of
22 the information DWR provides to support the WaterFix petition.

1 **CONCLUSION**

2 For these reasons, Restore the Delta respectfully moves for an order overruling DWR’s
3 objections and compelling DWR to produce documents responsive to Restore the Delta’s subpoena
4 duces tecum. If the Hearing Officers are considering granting DWR’s motion to quash and request
5 for a protective order, Restore the Delta requests that the subpoenaed documents either be ordered
6 produced in 90 days, as DWR has already indicated is feasible, or within a reasonable amount of
7 time before commencement of a Part 3 hearing.

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9 Respectfully submitted,

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11 Dated: March 7, 2018

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